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CITATIONS

NO. 72-147

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

BOB BULLOCK, ET AL., Appellants

V.

DIANA REGESTER, ET AL., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF APPELLEES DR. GEORGE WILLEFORD, MR. GENE DIEDRICK AND MR. THOMAS G. CROUCH

OPINIONS

The opinion of the District Court is reported at 343 F.Supp. 704 (A.Jur.S. 1A-62A, 83A-109A).[1] The opinion of Mr. Justice Powell

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[1] "A.Jur.S." refers to the separately-bound Appendix to the Jurisdictional Statement; "App." to the separately-bound appendix to be printed; and "R." to the record. References to Appellants' Brief are, unfortunately but unavoidably, to the pagination of the typewritten version of it.

denying Appellants' request for stay is reported at 405 U.S. 1201 (A.Jur.S. 197H-201H).

JURISDICTION

The judgment of the District Court was entered on January 28, 1972 (A.Jur.S. 63A-82A)[2] and the notice of appeal (A.Jur.S. 114B-117B) was filed on March 27, 1972. This Court noted jurisdiction on October 10, 1972 (___ U.S. ___ App. ____). Appellants contend that jurisdiction in this Court exists under 28 U.S.C. §§12[illegible] and 2101(b). For the reasons set forth in Point 3 below it is our submission that this appeal is not within the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are involved, as are Article III, Sections 26 and 28 of the Constitution of the State of Texas (A.Jur.S. 174E, 175E), providing for the times and method of reapportioning the State for elections to the lower house of the State Legislature, the State Apportionment Plan, Representative Districts (A.Jur.S. 118C-132C), and 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether, in the factural circumstances revealed by this record, the adoption

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[2]On February 8, 1972, the Court entered an order modifying its original judgment, noting that the modification "solely rectifies clerical errors" (A.Jur.S. 110A).

by the Redistricting Board of one system of representative government for Harris County and a differing system, which favors affluent candidates and their supporters, for other virtually identical metropolitan areas of the State constitutes an unconstitutional discrimination.

2. Whether Appellants have justified the admitted maximum population deviation of 9.9 percent between districts on the basis of any legitimate State policy.

3. Whether this Court has jurisdiction of this appeal under 28 U.S.C. §1253.

STATEMENT

This is a reapportionment case in which various officials of the State of Texas appeal from the decision of a three-judge district court, handed down on January 28, 1972. That Court entered declaratory judgment that the most recent state legislative redistricing scheme was unconstitutional, ordered the reapportionment of two of the larger metropolitan counties of the State of Texas, and took no action regarding the other 252 counties pending an opportunity for the Texas Legislature to act. The reapportionment scheme under attack was not the product of the Legislature of the State of Texas but rather of a special independent Board, the Legislative Redistricting Board, acting under extreme, self-incurred time pressures.

1. Events leading up to litigation.

Article III, Section 28, of the Constitution of the State of Texas provides that the Texas Legislature shall, at its first regular

session after each decennial census, apportion the State into senatorial and representative districts. In addition it establishes, against a failure of the Legislature to apportion, the Legislative Redistricting Board of Texas, composed of five elected officials.[3] It also requires that this Board meet within ninety days of the end of such a failing legislative session and itself redistrict the State within sixty days of its first meeting. Thus the 62nd Session of the Texas Legislature convened in January, 1971, under state constitutional mandate to redistrict both Senate and House (A.Jur.S. 9A). When it adjourned May 13, 1971 it had attempted to redistrict the House but not the Senate (A.Jur.S. 9A). It was therefore apparent by middle May of 1971 that action by the Legislative Redistricting Board would be necessary.

Ninety days were permitted for that Board to meet; it first convened on August 24, 1971, the 85th day. See Mauzy v. Legislative Redistricting Board, 471 S.W.2d 570, at 572 (Tex. 1971). By the time it convened, the House redistricting act passed by the Legislature had already been declared by the state trial court to violate Article III, Section 26, of the Constitution of the State of Texas, a decision shortly affirmed by the Texas Supreme Court. Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971). The Board nevertheless refused

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[3]The officials comprising the Board are the Lieutenant Governor of Texas, the Speaker of the the House of Representatives, the Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office (Art. III, §28, Tex. Const.).

to redistrict the House until ordered to do so by the State Supreme Court on September 27, 1971, in the Mauzy decision. On that date, over half of the sixty days granted the Board by the Texas Constitution to act after convening had passed. October 23, 1971 was the sixieth and last day. On Friday, October 22, 1971, the Board enacted its House plan, having enacted a Senate plan one week earlier (A.Jur.S. 9A). These suits followed.

2. Procedural matters preliminary to trial.

The order of the three-judge court dealt with four consolidated cases which were originally filed in four separate courts, the United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas, by four separate groups of plaintiffs (A.Jur.S. 3A-6A). On December 13, 1971, Chief Judge John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit, entered an order constituting a three-judge court in each of the four cases, consolidated the cases for hearing and submission, and transferred them to the Austin Division of the Western District of Texas (A.Jur.S. 6A-7A). A joint pre-trial conference was held in Austin, Texas, on December 22, 1971, and Judge Justice, the managing judge of the three-judge court, entered an order establishing expedited discovery procedures (A.Jur.S. 8A). Pursuant to that order the depositions of the members of the Legislative Redistricting Board, the staff of that Board, and various public officials and private citizens throughout the State of Texas were taken during the week of December 27-31, 1971. On their own motions, certain of these Appellees, Dr. George Willeford and Mr. Gene Diedrick, respectively Chairman of the Republican State Executive Committee and Chairman of the Republican Executive Committee of Smith County, Texas, who had

been joined as parties defendant in the suit filed in the Eastern District of Texas, were realigned as parties plaintiff (A.Jur.S. 8A). On December 31, 1971, a final pre-trial conference was held where it was stipulated that any evidence heard in any one case could be considered by the Court in all (A.Jur.S. 8A).

3. Conduct of the trial.

On January 3, 1972, the three-judge court convened in Austin, Texas, heard live evidence for three and one-half days, and received numerous depositions containing further testimony. After closing arguments, the case was submitted to the Court on January 6, 1972. Throughout this extensive hearing the State of Texas maintained, as it does before this Court, that it had no obligation to introduce evidence or otherwise to justify the reapportionment scheme of the Legislative Redistricting Board, contenting itself with the general position that any population deviations between districts were trivial ones resulting from the Board's effort to observe county lines and ignoring, as does its brief here, the question of the unequal treatment by the Board plan of essentially identical metropolitan areas: Houston, Dallas and San Antonio. No evidence was offered by the State to justify the population deviations in the Board's scheme, nor any establishing any State interest in the particular reapportionment scheme adopted by the Board. Moreover, at the conclusion of the hearing on January 6, 1973, the Court requested that all parties submit proposed alternative legislative reapportionment plans, but the State of Texas refused to submit any statewide plan or even a plan for any portion of the State.

Plaintiffs, for their part, introduced both lay and expert testimony and other evidence bearing on the motives and procedures of the

Board in adopting the plans under attack; the peculiar groupings and divisions of counties to be found in the plan; the want of differences between the large metropolitan areas accorded different systems of representation under the plan, as well as the effect on candidates and voters of these differing systems; the population deviations to be found in the plan's districts; and the locations, characteristics, and past and present social and legislative treatment accorded Texas' Negro and Mexican-American citizens--with special reference to those citizens residing in the so-called urban ghettos and barrios. This evidence produced the findings of the court, detailed in its opinion and summarized in paragraph 4 following. We shall have occasion to refer to specific portions of this evidence in the arguments to follow.

The three-judge Court considered the case for twenty-two days and issued a detailed per curiam opinion, over sixty pages in length, which was accompanied by substantial separate opinions by both Judge Justice and Judge Wood.

4. Significant findings of the Court below.

The Court below found the State Senate plan to be free from constitutional defect. The plan for the State House of Representatives was, however, found defective: The Court indicated that on one mode of computation the Board's plan provided for as much as 21.6 percent population deviation (A.Jur.S. 13A, n.5) and found a deviation of 9.9 percent according to the State's own figures; found that the State's justification of these deviations--the "necessity" to avoid crossing county lines--had been followed by the Board only

fitfully,[4] and that there was no evidence to indicate why the Board had followed this policy in some places and not in others (A.Jur.S. 16A-18A); that the State had previously announced a firm policy that there were to be no multi-member, at-large districts that encompassed more than 1,000,000 people (A.Jur.S. 20A-21A) and that the State had abandoned this policy without explanation; that the Legislative Redistricting Board's plan was not the product of legislative action but of a Board of five members, only one of whom was a member of the legislature (A.Jur.S. 19A-21A); that it cost a potential candidate for a position as representative to the State House of Representatives in Dallas County, who must seek the votes

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[4]The Board plan cuts the boundaries of 19 counties (A.Jur.S. 15A). Each of four counties--Smith, Brazoria, Hidalgo and Jefferson--is doubly dismembered, its surplus population being divided between two other districts (A.Jur.S. 16A). Appellees were therefore at first perplexed to read in Appellants' Brief statements such as "The... reapportionment...makes only one division of a small county.... (p. 6)." Apparently, however, Appellants intend the reader to understand by this language, not that only one county is divided and that a small one, but that of the many counties divided only one is small; and that the Texas Constitution, Article III, §26, lays some special emphasis on small counties. See, also, the discussion at pp. 37-39, infra.

of a constituency of 1,327,000 people,[5] in Bexar County (800,000), and in other metropolitan multi-member districts, a great deal more money to seek office than a candidate for the same position from Harris County (Houston), who must seek the votes of a constituency of approximately 75,000 people (A.Jur.S. 28A-30A); that by the only evidence before the Court there are no meaningful differences between Harris and Dallas Counties (A.Jur.S. 30A); that this difference in treatment of equal urban electorates results in a classifying of candidates and their abilities to run and form political associations according to wealth, affecting basically and unequally the poor and those not members of established political parties (A.Jur.S. 30A); that the State offered no justification for this disparate treatment (A.Jur.S. 26A-34A); that there has been a long history of racial discrimination by the State of Texas against Negroes (A.Jur. S. 38A-39A); that the multi-member apportionment scheme operates to cancel the voting strength of racial and political minorities in Dallas County, Texas, and that the political participation of Negroes

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[5]It is interesting to note, as the Court below did (A.Jur.S. 38A), that thirty United States Senators run to smaller constituencies than had to be faced by one who wished to represent Dallas County in the Texas House of Representatives under the Board's multi-member plan.

The combined Senatorial constituencies of Alaska, Nevada and Wyoming are significantly smaller than this one county-wide district. The State admits that there is no legislative district in the United States larger than Dallas County (R. 1086).

in Dallas County, Texas, had been a result of the patronage of the Dallas Committee for Responsible Government, a political organization of powerful white business leaders who designate the number of Negroes who shall seek office and who select the Negro candidates for office (A.Jur.S. 36A-41A); that the record evidences a recurring poor performance on the part of the Dallas County delegation to the Texas House of Representatives regarding Negro interests (A.Jur. S. 41A); that there has been a long history of discrimination by the State of Texas against Mexican-Americans (A.Jur. S. 45A); that the multi-member apportionment scheme opeates to cancel the voting strength of racial, ethnic, and political minorities in Bexar County, Texas (A.Jur. S. 42A-56A); that the San Antonio Republicans failed in their effort to prove an unlawful gerrymander with respect to the senatorial districts in Bexar County, Texas (A.Jur.S. 56A-58A); that the Harris County plaintiffs failed to prove that the senatorial reapportionment scheme for those senatorial districts located in Harris County was unlawfully gerrymandered (A.Jur. S. 58A-60A); that the legislature should be given another opportunity to establish a statewide reapportionment plan, but that the Board's particular multi-member apportionment schemes in Dallas and Bexar Counties contained such compelling constitutional defects as to require immediate relief (A.Jur. S. 61A-62A).

5. Progress of the appeal.

After timely notice of appeal, the State sought a stay of the judgment insofar as it reapportioned Dallas and Bexar Counties into single-member districts in parity with Harris County. This was denied by Mr. Justice Powell,

with opinion. 45 U.S. 1201 (A.Jur.S. 197H). Probable jurisdiction was noted on October 10, 1972 (App. ____).

SUMMARY OF ARGUMENT

1. The Plan attacked unconstitutionally discriminates between equals by adopting two different systems of representative government for identical urban areas, one of which favors the affluent candidate and his supporters.

The Legislative Redistricting Board has decreed single-member districts, each in the 75,000-voter range, for Harris County, (Houston) Texas, the largest urban area in Texas. For all other ubran areas it dispensed a different system of representation--at-large representatives elected from multi-member districts. The Dallas district contained 1,327,000 people and elected 18 representatives on an essentially county-wide basis. Over 830,000 people, electing 11 representatives, composed the Bexar (San Antonio) district. The Dallas district is the largest in the Country, more populous than 15 states, the Bexar district larger than 11. Such enormous districts unreasonably discriminate against the inpecunious candidate and his supporters by making low-expense campaigns impossible and by placing them at the disposal of the established and the affluent.

It was amply established, indeed undisputed in the record, that the Harris, Dallas and Bexar urban electorates are essentially identical for apportionment purposes, having no demographic or geographic distinctions of any civic significance. All contain discrete and substantial pockets of Negro and Mexican-American voters, who have a recent local history of racial and economic discrimination

imposed not only by societal but by state action, and of Republicans, the minority political party in Texas.

All governmental experts and most lay witnesses who testified agreed, as has this Court in its decisions, that the two systems have markedly different consequences and that the single-member system is the preferable model of representative government. It is clear in the record that representative responsibility, voter knowledge and even identification of candidates and representatives, representative efficiency and ability to represent the range of interests among his constituents, all decrease in a progression at least arithmetical as constituent numbers increase.

The reverse is true of the expense of getting elected, which increases to a quantum-jump at the point where bill-boards and shoe-leather are no longer practical campaigning tools. At this point, television and newspaper techniques become essential. As the record shows, these are inordinately expensive, and tyrannically so in Dallas, for peculiar local reasons. The record further shows that, in Dallas and Bexar Counties, the vastness of the electorate produced by the Board's plan destroys any hope of the non-affluent candidate and his supporters to conduct an effective campaign, placing him at the disposal of the affluent and established if he is to have any hopes of success. It further shows that this is precisely what has happened: in Dallas County, it is the DCRG which determines how many and who the Negro candidates will be; in Bexar County, the GGL performs the same office for Mexican-Americans. Without such establishment support, the record shows, it is impossible for a poor candidate to be

nominated or elected; with it he can hardly lose. And because of their submergence in the partisan sea, the Republican areas are customarily frozen out of success in county-wide elections entirely, though they repeatedly win local races run on a smaller-district basis both in Dallas and Bexar Counties. Harris County, by comparison, is accorded the benefits of a neutral and non-discriminatory system of single-member districts having electorates in the 75,000 population range, which are reachable by various campaigning methods.

Nothing inherent in the Texas situation causes these disparities; it is the Board's plan which does so.

Though neither districting method is ordinarily impermissible, on this record showing at-large districts of the size and in the circumstances presented by Dallas and Bexar are even more invidious than the Texas-size filing fees invalidated in Bullock v. Carter, 405 U.S. 134 (1972). They are constitutionally infirm for the reasons there stated, as well as on general First and Fourteenth Amendment principles of freedom of political association, due process, and equal protection. At any rate, they are plainly invalid unless shown to be reasonably necessary to some legitimate state objective, rationally pursued.

Appellants' brief does not discuss the questions raised by this point, though its argument to the trial court discussed little else. The sole justification for the Board plan advanced by the brief is the preservation of county lines, which is irrelevant to these questions. These are as well-preserved by single-member as by at-large districts within the county.

The Board members testified to no rational bases for these decisions. Two suggested local sentiment in Dallas as their guide. That local sentiment in Dallas was for at-large races is utterly refuted by the record. The record further shows that it was similarly refuted before the Board, at its meager and perfunctory hearings. The record also shows that the supposed state policy advanced to the district court and this Court in Kilgarlin v. Martin, 252 F.Supp. 404, at 444 (S.D. Tex. 1964), rev'd in part sub nom. Kilgarlin v. Hill, 386 U.S. 120 (1967), of limiting districts to 1,000,000 population, was ignored by the Board.

One Board member testified that time pressure and schedule conflicts among Board members prevented their being able to divide urban areas, another that Dallas had always been multi-member so why change it, and another that he was for single-member districts but thought a majority of the Board would vote against them so never proposed them.

These are all the reasons advanced by anyone, formally or informally, for the disparate treatment given Harris, Dallas and Bexar by the Board. There was no legitimate State policy involved, and very little policy at all. Since no justification is shown, and since the plan is seriously and invidiously discriminatory between citizens equally situated, it must fail.

2. Appellants were required to justify the admitted, significant population deviation between districts, and the arguments offered do not do so.

Appellants seek to excuse an admitted 9.9 percent maximum and an average 1.82 percent population deviation, with a deviation ratio of 1.1 to 1, among the Board's districts by arguments which are wide of the mark. Having admitted that greater population deviations than would otherwise be necessary are occasioned by the Board's supposed policy of respecting local political subdivisions, Appellants are committed to this justification and must stand or fall upon the basis of it.

The justification attempted is ingenious, but spurious. It is epitomized in the brief's triumphant assertion that the good faith effort made by the Board succeeded in reapportioning the state within tolerances "established by this Court's prior decisions, and with only one, fully-explained departure from the mandate of the state constitution" (Appellant's Brief 4), that is, "only one division of a small county," as the brief elsewhere (p. 6) makes clear is meant.

Appellants have egregiously misconstrued the mandate of the Texas Constitution, as explicated in the case on which reliance is placed, Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971). Neither the constitution nor that opinion lays any special emphasis on small county integrity. It is county integrity with which the Texas Court is concerned. In addition, that Court carefully notes that the section of the Texas Constitution involved is entirely subordinate to Federal considerations: "...all requirements of Section 26 are inferior to the necessity of complying with the Equal Protection Clause." 471 S.W.2d, at 378 (emphasis added). This contention by Appellants amounts to no more than a tailoring of the Texas Constitution to Appellants' measure

and an insistance on being more constitutional than the Supreme Court of Texas.

Instead, in fact, the plan contains nineteen departures from the actual constitutional mandate--nineteen counties are divided--and four direct violations of the Texas Supreme Court's explicit warning in Craddick against fragmenting counties in more than two parts. Other glaring deficiencies, some of which are detailed in the opinion below (A.Jur.S. 13A-18A), appear in the plan, producing unnecessary deviations for reasons unrelated to preserving county lines.

Nor is there any evidence of the vaunted "good faith effort" by the Board. The House plan was, in fact, drawn by the Lt. Governor's assistant, Mr. Spellings, within about a 48-hour period, starting from scratch. He did so with only one instruction from any Board member, not to use urban single-member districts except in Harris County, and the plan which he drew was blessed by the Board the next day. And the record even contains an admission by one Board member that it was his understanding that the Board was striving, not for population equality between districts, but for deviations which did not exceed 5 percent off the average (Calvert Dep. 25). See Kirkpatrick v. Preisler, 394 U.S. 526, at 531 (1969).

3. The Three-Judge District Court did not enter an injunction having statewide impact, therefore jurisdiction in this Court is lacking.

The only injunctive relief granted by the Court below had impact on only two of the State's 254 counties. Jurisdiction in this Court under 28 U.S.C. §1253 therefore does not exist. Under such decisions of

this Court as Gunn v. University Committee to End the War, 399 U.S. 383 (1970) and Board of Regents v. New Left Educational Project, 404 U.S. 541 (1972), as well as Ruckelshaus v. Chavis, 403 U.S. 914 (1971) and Whitcomb v. Chavis, 403 U.S. 124, 138, n. 19 (1971), it is clear that it is the decree of the three-judge court (and not the pleadings before it) which determines this Court's jurisdiction. It is also clear under these authorities that only an injunction having statewide impact suffices to support jurisdiction in such a direct appeal. This injunction, though it does concern two of the State's most populous counties, clearly has no more effect on the State at large than did the order affecting the University of Texas System in New Left. The appeal should be dismissed.

ARGUMENT

1. THE ADOPTION BY THE REDISTRICTING BOARD OF ONE SYSTEM OF REPRESENTATIVE GOVERNMENT FOR HARRIS COUNTY AND A DIFFERING SYSTEM, WHICH FAVORS AFFLUENT CANDIDATES AND THEIR SUPPORTERS, FOR OTHER VIRTUALLY IDENTICAL METROPOLITAN AREAS OF THE STATE CONSTITUTES AN UNCONSTITUTIONAL DISCRIMINATION.

Equal Protection requires "...the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds v. Sims, 377 U.S. 533, at 565. The voters comprising the multi-member constituencies

of Dallas and Bexar Counties[6] constitute bodies standing in the same relationship to the exercise of the state's apportioning power as those of Harris County; for no or no sufficient reason, that power has dealt with the sensitive area of their franchise in a manner not only significantly different, but calculated to disadvantage further the poor, the minority, the outsider. The instance at hand is most extreme: the largest multi-member legislative district known by any participant in the proceedings to exist in this nation. We emphasize that these arguments are entirely independent of those grounded in population deviation and the other deficiencies of the Board plan, though the cumulative effect of all these deficiencies is peculiarly invidious.

A. There is no rational basis for the disparate methods of redistricting Texas urban areas.

The Dallas County district consists of more than 1,300,000 persons (A.Jur.S. 37A), and is the most densely populated area in Texas (R. 386). Its population exceeds that of fifteen states (A.Jur.S. 38A). Under the Board plan, eighteen representatives, well over one-tenth of the state lower house, were to be elected at large from this district. This was almost certainly the largest legislative district in the United States. Appellants admit (R. 1028) there was none larger. Almost one-third of the membership of the

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[6]And those of the other metropolitan, multi-member districts in Texas under the Board plan.

United States Senate runs to smaller constituencies (A.Jur.S. 38A); by the current census, United States Congressmen from Texas are elected from constitutencies roughly one-third the size of this monstrous district. Submerged within the area's population lie geographically-discrete, significant, ethnic minorities, Negroes and Mexican-Americans, and a like political one, Republicans (R. 201, 728, 229).

Likewise under the Board plan, eleven at-large House delegates were to be elected from the Bexar County district, site of the City of San Antonio. This area presents a picture differing from that just described in Dallas County in two respects only. The Bexar district's population is 830,000 plus (A.Jur.S. 48A), exceeding that of eleven states (A.Jur.S. 38A), and the Mexican-American is in a numerical plurality (A. Jur.S. 49A). However, the same minority pockets, ethnic (R. 524-7) and political (R. 983) exist.

From these two multi-member districts, then, were to come a total of twenty-nine representatives to the 150-member Texas House, almost one-fifth of its entire membership. Other multi-member districts throughout Texas, all metropolitan and none shown to differ materially from any other Texas urban area except in population, were to contribute an additional thirty-one members to the House (A.Jur.S. 119C-126C). These districts range in size from the Tarrant County (Ft. Worth) district, with its 600,000-plus population (A.Jur.S. 28A), down to Hidalgo County--sundered in three but relentlessly multi-membered as well (A.Jur.S. 125C)--with its 145,000 core district (A.Jur.S. 28A). Had Harris County, which emcompasses the

City of Houston, been similarly dealt with by the Board, its twenty-three at-large delegates, with the other multi-member district delegates, would have constituted a tidy majority of the Texas House.

But it was not. Instead Harris County, alone of all the metropolitan areas of the state, was divided into single-member districts, twenty-three of them. And this despite the fact, undisputed in this record, that the geographic and demographic characteristics of Harris County were virtually identical to those of Dallas and of Bexar Counties (A.Jur. S. 30A). No witness was able to point out any difference between their essentially similar, urban electorates; on the contrary, many testified there was no material difference (R. 233, 300, 370-1, 840).

B. The disparate redistricting methods result in improper discrimination.

At first blush it may seem that the Board's decision[7] that Dallas County and others similarly situated should be multi-member while Harris (Houston) alone should be single-member is without significant consequences to voter or candidate. After all, assuming the population arithmetic comes out satisfactorily, the voters lumped together in the multi-member pool have, collectively, the

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[7]If such it was. As we shall shortly note, the testimony of the Board members indicates that at best the "decision" was simply something that happened, the product of inattention, misapprehension, indifference and inertia.

same sort of proportionate strength in the legislature which they would have had from aggregated single-member districts comprising the same population. Moreover, it is arguable that the multi-member constituent possesses at least one and perhaps two advantages over his single-member counterpart. He clearly has a greater number of legislators both beholden and aspiring to his vote and hence presumably attentive to his views. And since multi-member districts appear inexorably to produce local political sub-parties,[8] with their sponsored slates of candidates, there may be a greater degree of cohesiveness among delegations so elected, at least among those running on the same slate. On the other hand, the single-member district clearly possesses numerous advantages, which led the governmental experts who testified (R. 228, 301-2), as well as this Court in a prior opinion,[9] to favor it as a preferable model of representative government: improved rapport between representative and constituent, resulting in better accountability to the voter and a better opportunity for the representative to know his constituents' views; a manageable range of interests to represent, as contrasted with the impossibility in a large multi-member district for the representative to represent the vast range of conflicting

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[8]Examples of such sub-parties are the Citizen's Charter Association (CCA) for city elections and the Democratic Committee for Responsible Government (DCRG) for county elections, both in Dallas County (R. 686), and the Good Government League (GGL) in Bexar County (R. 1002).

[9]Connor v. Johnson, 402 U.S. 690,. 692 (1971).

views and interests necessarily encompassed even if he could know them (R. 228, 289, 344-5); and, more practically yet, the multi-member representative's inability even to respond to the mass of communications directed to him from his aggregated constituents (R. 451, 817).

Neither method of redistricting is automatically impermissible. Indeed, this Court has consistently held that ordinarily a state may choose either of the two models of representation. E.g., Whitcomb v. Chavis, 403 U.S. 124 (1972); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). But the multi-member districts presented in this case are not ordinary. Their extraordinary size combined with the significant minority pockets dispersed throughout them render them, as the Court below found, constitutionally infirm.

In Dallas and Bexar Counties, the vastness of this amorphous electorate confronted by the potential candidate rules out all campaigning save the high-expense methods of television, radio and newspaper (R. 834, 632, 641). Dallas presents a further turn of the screw: because of its high-density population, the cost of television, calculated by reference to number of viewers, requires the candidate to pay for large amounts of useless coverage beyond the district in order to be seen within it (R. 834); the major newspaper in Dallas is in parity because of its statewide circulation, upon which its advertising rates are quite-properly calcuated (R. 836-7). Door-to-door campaigning and other methods appropriate to local, low-budget races are thus consigned by the redistricter to the rubbish heap (R. 232, 253-4, 641).

With them go all hopes of the poorly-financed candidate to campaign for nomination in the all-important Democratic primary (and of those who would vote for him of their chance to do so), as well as most hopes of the minority Republicans to achieve the name-identification in general elections needful to any reasoned hope of success (R. 823, 847, see 811-13).

And so, propelled by the heavy hand of the redistricter, the minority or inpecunious candidate who maintains despite all restrictions his desire to run, knocks on the bosses' door with hat in hand. Unable to bear the expense of his own campaign, yet still wishing a chance to win, he has no other choice (R. 789). The uncontradicted testimony of witness after witness[10] established that in Dallas County is virtually impossible, because of the county-wide district, to be nominated for the Legislature unless the candidate is acceptable to and supported by the DCRG.

Thus is is the DCRG which decides how many Negroes (R. 427) and which ones (R. 261) will be nominated by the Democratic Party in Dallas. As Mr. William H. Clark, III, a director of the DCRG, testified, for the 1972 races the DCRG had decided to pick three Negro nominees and one Mexican-American (R. 943).

And in San Antonio, it is the GGL which performs the same function as to the Mexican-

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[10] See, e.g., the testimony of the following witnesses: Weiser (R. 218-221); Mauzy (R. 341, 348); Conrad (R. 404); Holmes (R. 445); Allen (R. 695).

American, hand-picking candidates (R. 1002) without reference to the Mexican-American communities' wishes (R. 1003) and rolling over the pitiful efforts of the "Barrio" candidates (R. 629) by means of massive expenditures (R. 628-9). Two of the State's own witnesses admitted the restrictive effect on the Mexican-American franchise of the Bexar County multi-member district. Mr. Barrera, a former Secretary of State of Texas, at first testified that such districting prevented Mexican-Americans from having a full participation in Bexar County political processes (R. 558), and later backed off to the point of averring that under it they do not get as "representative a representation" (R. 584). Mr. Garza, a ten-year GGL member and City Councilman (R. 618-19), felt that the multi-member district offered the Mexican-American a full but "rather restrictive" opportunity (R. 624). As for the effect on Republicans, it was Mr. Garza's view that they were more discriminated against in San Antonio than the ethnic minorities (R. 622).

That the same observation is true in Dallas was amply born out by the testimony of Fred Agnich, founder of a major Dallas-based concern and a Republican House delegate (R. 808-830). He outlined the crushing burden imposed by the multi-member Dallas district on candidate recruitment (R. 811), occasioned by the tremendous sums required by the necessary use of television in such a district (R. 813). A serious, expert study made in 1970 by professionals indicated that, to have a chance to win, a fifteen-man Republican ticket would need $162,000 minimum to $220,000 optimum, with each candidate raising additional money for his own race (R. 814-15). Agnich himself spent $31,000 on his 1970 campaign (R. 815) which, despite

his wide and favorable community reputation (R. 809), procured him the $4,800 per year[11] office by the margin of 730 votes out of 247,000 cast (R. 816).

Such financial tyranny is beyond all reason, is the direct result of these swollen, multi-member districts, and unreasonably restricts the political participation of the poor--especially the poorest: Mexican-Americans of the "Barrio" (R. 524-525) and Negroes (R. 323).

It should be emphasized that the effect referred to is the result of the plan, and not of any factor inherent in the situation faced by the Board. It well may be, for example, that because of constitutional requirements of population parity combined with the vast and thinly-populated areas of West Texas, districts must necessarily be there created which are more expensive to campaign in than a shoe-leather, single-member district in the Houston inner city. Such situations are unavoidable in the nature of things and have no bearing on the case at bar: here we treat of matters which might and should have been otherwise but for the Board.

Finally, it was undisputed in the record that the larger the multi-member district, the more invidious is its effect (R. 303, 803), an obvious consequence of the multiplication of voters and area which forces slection of high-expense campaign techniques. As has been noted, there are none larger than the Board's Dallas mon-

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[11] plus per diem and mileage during the sessions. Tex. Const., Art. III, §24.

strosity and few than its Bexar and Tarrant County delineations.

The Board's choice of these multi-member districts thus presents yet another feature of the Texas political system calculated, like the filing fees invalidated by this Court in Bullock v. Carter, 405 U.S. 134 (1972), to fall with heavy and unequal effect on voters and candidates according to their economic status. It would be hard to find language more apposite to the case at bar than that of Chief Justice Burger speaking for a unanimous Court in that case:

> "Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the afflu-

ent the power to place on the ballot their own names or the names of persons they favor. Appellants do not dispute that this is endemic to the system. This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the view of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this sytem falls with unequal weight on voters, as well as candidates, according to their economic status.

"Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in Harper, that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. 134, at 143-4.

In Harris County, by contrast, twenty-three single-member districts were decreed by the Board (A.Jur.S. 127C-128C), each of approximately 75,000 persons, reachable by a variety of campaigning methods including inexpensive ones, which do not unreasonably favor the affluent candidate (R. 232).

C. No legitimate state interest supports the unequal treatment of identically situated metropolitan areas.

The serious injury that falls upon the residents of Dallas and Bexar Counties and of the other metropolitan areas of Texas because of the Board's choice of multi-member representation for them, rather than single-member representation as provided for the residents of Harris County, could possibly be justified, like any injurious unequal treatment, by some important state interest that was fostered by that choice. The record here, however, does not reveal that any state interest was fostered by the Board's choice.

The only justification proffered for the unequal treatment was that the apportionment systems employed were preferred by the residents of the areas where they were used.[12] As to Harris County this is doubtless correct; but as to Dallas County, as noted by the Court below (A.Jur.S. 31A), the suggestion is simply untrue. Numerous witnesses from Dallas testified to their preference for single-member districts (R. 333, 431-3, 692). One of the House members from Dallas, Rep. Zan Holmes, testified that as a member of the House Redistricting Committee of the last legislature he attended that committee's meetings held in Dallas and that a majority of those who appeared before it were for single-member districts (R. 436). Presentations were made before the Board itself by Dallas witnesses to like effect (R. 61, 354). And to cap all, the Board was furnished the testimony of Victor F. Robertson, Jr., a highly qualified (R. 775) public opinion and market research analyst, regarding the results of various

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[12] Martin Dep. 31, Calvert 13.

public opinion polls taken by him in the Dallas area from 1966 (R. 791) through late 1968 (R. 792) and extended to the date of his testimony (R. 792-3), for clients ranging from the AFL-CIO through the CCA and Conservative Democrats to the Republicans (R. 777). He testified before the Board and before the Court below that these showed a basic and continuing trend in Dallas of almost 3 to 1 in favor of single-member districts among those who made a choice (R. 792-3).

This powerful testimony received varying receptions from the Board members who heard it. Lt. Governor Barnes was not present, but knew of the polls from newspaper reports (Barnes Dep. 126). His only response was to note the importance to polls of how the question is asked (Barnes Dep. 126).[13] Attorney General Martin recalled the testimony regarding the poll, testified that he considered it (Martin Dep. 90-91), and further testified that he multi-membered Dallas County in a disinterested response to the wishes of the people there (Martin Dep.

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[13]Mr. Robertson's question was (R. 794):

"As you noticed, Dallas County voters will choose 15 members for the Texas House of Representatives this year. Some people think each member should be elected from his own individual district. Some think he should be elected by the whole county. In your opinion which is better, individual districts or county-wide?"

31, 63).[14] Mr. Calvert, the Comptroller of Public Accounts, testified that the wishes of the people in Dallas moved him also to multi-member it (Calvert Dep. 13), that he did not recall any testimony about a 61 percent poll favorable to single-member districts, which made very little impression on him and which he gave very little consideration (Calvert Dep. 62-63). Calvert testified as well that he paid small attention to the testimony before the Board, since there were always two sides to it (Calvert Dep. 65-66), referring to the testimony by a pejorative epithet (Calvert Dep. 66). Even if majority wishes were a justification for depriving identifiable groups of an equal opportunity to participate in the political process, it was plainly established in this case that the imaginary majority wish was at best a post hoc rationalization for the Board's choice.

A final some-time justification, offered by the state to the District Court in the 1966 case of Kilgarlin v. Martin, 252 F.Supp. 404 (S.D. Tex. 1966), rev'd in part sub nom. Kilgarlin v. Hill, 386 U.S. 120 (1967), was the supposed state policy of providing single-member districts for counties upon their attaining a population of one million or more. The state interest fostered by this policy is unclear, but it apparently has been abandoned since the Dallas County multi-member district contains more than 1.3 million people and elects so many legislators that the candidates for that office are too numerous

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[14]General Martin added that that the decision to multi-member Dallas County was not mathematical at all, but political (Martin Dep. 37).

to be listed on the standard voting machine (R. 342, 370-371).

It is inescapable on this record that no state policy was involved in the handling of Dallas County (or, apparently, any other metropolitan district), and the many and differing explanations offered for their actions by the members of the redistricting Board only emphasize this.

Board Member Armstrong believed that multi-member treatment of urban areas other than Houston was a non-decision, resulting from time pressure, schedule conflicts, and the inability of the Board to get together and do something different (Armstrong Dep. 17). Board Member Calvert gave his reasons as being the desires of the people in Dallas, already discussed, and observed that Dallas had always been multi-member, so why change it? (Calvert Dep. 69-70). Board Member Martin cited the wishes of the people as his sole reason (Martin Dep. 63). Board Member Mutscher testified that he voted against both the House and Senate plans prepared by the Board and signed neither (Mutscher Dep. 15). The Appendix to the Jurisdictional Statement is apparently erroneous in indicating (131C) that he did. And Board Member Barnes did not know when the decision was made, but insofar as he decided, did so on the basis of how he thought the other Board members would vote (Barnes Dep. 97, 98).

It is thus plain that the Board's choice of multi-member districts for Dallas and Bexar Counties and the other metropolitan areas of Texas, while the residents of Harris County enjoyed single-member districts, was not made to foster any state interest, compelling or otherwise. And that choice, because of the particular facts in Texas found

to exist by the Court below, resulted in the denial of basic First and Fourteenth Amendment rights.

2. THE VARIANCES IN POPULATION AMONG THE DISTRICTS WERE NOT JUSTIFIED BY ANY RATIONAL STATE POLICY.

This Court's many reapportionment decisions establish that the Fourteenth Amendment's requirement of equal protection of the laws imposes on the states an obligation to make a good faith effort to assure that equal numbers of people have equal representation in state legislative bodies. There is some room for slight variances, but if the apportionment of representation actually achieved results in more than minimal deviation then the state must show that some important state interest justified the inequality. See, e.g., Abate v. Mundt, 403 U.S. 182 (1971).

The Board's plan here resulted in a 9.9 percent variance between the largest and the smallest legislative districts, or approximately 7,400 people. Even when a deviation has been the result of a good faith attempt to achieve equality, this Court has never found any deviation presented to it to be per se minimal and hence to require no explanation. Nevertheless, Appellants argue that no justification is required for this deviation, and this was the entire content of their position in the Court below. Here, however, Appellants go on to argue that even if the deviation is not minimal it is justified on the ground that it was the necessary consequence of a good faith effort of the Board to preserve county lines. This effort, the argument runs, though carried through "at the admitted expense of

greater population deviations," resulted in "...a reapportionment of the state that makes only one division of a small county..." (Appellants' Brief 8, 6). And the deviation under the Board's plan was not improper since "...what variances there were [are] well within the limits established by this Court's prior decisions, and with only one fully-explained departure from the mandate of the state constitution" (Appellants' Brief 4).

1. Appellants contend that no justification is required of the deviation here because it is within the permissible limits set forth by this Court in Reynolds v. Sims, 377 U.S. 533 (1964). The Court below rejected this contention on the ground that this Court's subsequent decision in Kirkpatrick v. Preisler, 394 U.S. 526 (1969), "may substantially erode the 'tolerance' dictim in Reynolds" (A.Jur.S. 12A). Appellants' position basically is that Kirkpatrick has no application to Texas legislative districts, since that case involved and is limited to congressional redistricting.

Appellants are right to attack the Kirkpatrick rule for if it applies there is an end of the matter. This Court stated there that "the State must make a good-faith effort to achieve precise mathematical equality.... Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small" (394 U.S. at 530-531). There is no "mathematical equality" under the plan devised here. It contains a 9.9 percent maximum deviation, a deviation ratio of 1.1 to 1, and an average deviation of 1.82 percent, all by the State's own calculations (Appellants' Brief 11). Appellants did not attempt

to justify these except by general reference to the State Constitution's "prohibition" against cutting county lines, an argument spurious in several respects as we shall deomonstrate shortly. Thus if Kirkpatrick has application, Appellants cannot prevail.

Nor do Appellants fare any better if Kirkpatrick does not apply. This record reveals a melding of (1) enormous, multi-member districts, unequally imposed on equivalent voters, undisputedly having the effect of favoring the affluent candidate and his supporters at the expense of the less affluent, and (2) unjustified population deviations of almost 10 percent.[15] As such, it is like neither Abate nor Whitcomb v. Chavis, and is different from any prior case decided by this Court except, in some respects, Bullock v. Carter, supra. But it combines the worst features of the plans presented in all those cases, and adds other bad ones. The combined effect is to render the plan here constitutionally infirm even under the principles of Reynolds v. Sims.

2. Appellants' claim that the Board made a good faith effort to achieve popula-

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[15]The Board's plan has other graceless features as well. For example, the State's own witness, Representative Paul Silber of Bexar County, admitted that Senate District 21, which combines the Republican area of San Antonio with 11 or more Border and South Texas Counties, was "an outright political gerrymander" (R. 984).

tion equality is not borne out by the record. We have already shown how the Board went at its task.

It commenced by refusing to act at all to redistrict the House, proceeding only when directly ordered to do so by the Supreme Court of Texas. With twenty-six days left, it still dallied until it had to do what Lt. Governor Barnes called a 10-day job (Barnes Dep. 149). One of its members testified that because of the "peculiar situation" in which the Speaker of the House found himself, he did not really participate in its counsels and it was actually a four-man board (Calvert Dep. 40). The same member approved the plan under the mistaken impression that it provided multi-member Senatorial Districts for Dallas County, and was still not sure at his deposition whether it did or not (Calvert Dep. 47-8). Another testified that so far as he knew, the Board gave the staff members who drew the plan no instructions about how to do it (Armstrong Dep. 20). And finally, one member testified that the House and Senate plans were both put together by Lt. Governor Barnes and two of his assistants, a Mr. Spellings and an aide of his (Mutscher Dep. 24).

Mr. Spellings amply confirmed this and, indeed, narrowed the matter even further. He testified that he drew the plans (Spellings Dep. 15-16) at Barnes' direction and with only one instruction from Barnes, which was not to use single-member districts except in Harris County (Spellings Dep. 9-10, 34-35). He talked about the House plan with only one other Board member, but did not ask his opinion because he knew it already (id. at 35), and in fact disregarded it in preparing the plan (id. at 19). Most of the Senate plan was

his (id. at 56-57); he drew a plan he thought the Board would accept, but not under its dictation (id. at 62). He did the drawing and made the basic decisions (id. at 159), and the Board knew this (id. at 161). He drew the entire House plan between a Tuesday afternoon at 5:00 p.m. and early in the afternoon on the succeeding Thursday, starting from scratch (id. at 29). The plan which he drew was adopted the next day by the Board (id. at 17-18). And he did all this with no prior redistricting experience, except in the last 24 hours of the prior legislative session (id. at 115). All this is undisputed, and makes clear that the final result was not the Legislature's plan, or even the Board's plan--it was Mr. Spellings' plan.

Moreover, the record contains a tantalizing clue that this Court's expressed fear in Kirkpatrick, that "...to consider a certain range of variances de minimis would encourage legislators to strive for that range rather than for equality..." (394 U.S. at 531), has here been realized. Attorney General Martin testified that his instructions and advice were, in the Kirkpatrick vein, to keep percentage deviations to zero if possible (Martin Dep. 35). Board Member Calvert, however, a non-lawyer who looked to Martin for legal advice (Calvert Dep. 17-18), somehow got a different message: that population variations between districts were not to exceed 5 percent off the average (id. at 25). So viewed, the resulting maximum deviation of 9.9 percent between districts in the Board plan, as computed by the State (Appellants' Brief 11), was either a success although a very near run thing or a stunning coincidence.

3. The basic justification advanced for the population disparities is that the Board sought to maintain county lines "...at the admitted expense of greater disparities in population deviation..." (Appellants' Brief 8).[16] The general argument is a rather standard after-the-fact treatment of the variances. But its "small county" phase is imaginative and ingenious.

Appellants assert that the Board "...adopted a plan with the lowest population variances available to it, with what variances there were within the limits established by this Court's prior decisions, and with only one, fully-explained departure from the mandate of the state constitution...." (id. at 3-4). And they claim that the Board "...attempted to satisfy both federal and state constitutions. The result is a reapportionment of the state that makes only one division of a small county in contravention of Article III, Section 26, of the state constitution, yet keeps all districts within a maximum variation ranging from a low of 4.1 percent under the optimum to a high of 5.8 percent over the optimum" (Appellants' Brief 6).

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[16]Mr. Spellings, who as discussed above devised and drew the plan, did not recall "preserving county lines" when asked about his guidelines, though he named others (Spellings Dep. 76). In fairness, Mr. Spellings must have paid some attention to county lines, at least as a convenience, since he did preserve a great number of them.

Considering that the plan cuts the boundaries of 19 counties, and literally explodes four of them into three pieces each,[17] these statements in Apellants' Brief are confusing. We believe that they indicate that Appellants have constructed an argument of some cleverness by reasoning backward in this manner from the facts. Red River County is the smallest of the counties which is divided, and is also the only county divided the division of which can rationally be justified. On these facts, Appellants belatedly conclude that it was the Board's rational policy not to divide small counties, and that its plan succeeds brilliantly in this regard because only one small county is divided and that unavoidably. And Appellants now discern that what the Texas Constitution, Art. III, §26, as explicated by the Texas Supreme Court in Smith v. Craddick, supra, forbids--or especially forbids--is dividing small (or perhaps rural, Appellants' Brief 6) counties. Thus, by construing the Texas Constitution to forbid the division of small counties, rather than counties generally, Appellants are able to tailor their argument to fit the record, to claim that the "one departure" from the mandate of the state constitution is fully justified, and to make the laudatory statements quoted regarding the Board plan.

The argument fails for various reasons. In the first place, neither Article III, §26, nor the Texas Court's opinion in Smith v. Craddick lays any special emphasis on small or rural counties. It was "...the wholesale cutting of county lines...." and the fact that "...[a]lthough Grayson County has a popula-

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[17]Opinion below, A.Jur.S. 15A, 16A; see also 133C.

tion of 83,225, that county was not apportioned a representative as required by Section 26...." which brought down the legislature's House redistricting plan in Craddick (471 S.W.2d at 378; first emphasis supplied).[18] In the second place, any such discrimination in favor of citizens residing in small or rural counties would itself be of very dubious constitutionality.

The "small county" argument simply does not bear examination. Nor does the general "county lines" argument, in the face of the cutting of 19 counties of which four were not cut but fragmented, in exquisite disregard of the Texas Supreme Court's direct admonition in Craddick. The Court below catalogues numerous additional aberrations (A.Jur.S. 16A-18A).

The population deviations of the Board plan were not minimal, were not justified, and were not the result of a good faith effort. Hence, under both Kirkpatrick and the broader net of general constitutional principles, some of which were explicated in Bullock v. Carter, the plan is constitutionally defective.

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[18]The State's argument in Craddick was apparently the reverse of that presented here: that minimizing population variances justified wholesale cutting of county lines. The invalidated plan divided 18 counties with populations below 74,645 and 15 with populations above it. There were only twenty counties larger than Grayson County. 1972-73 Texas Almanac 157-160.

3. THE COURT DOES NOT HAVE JURISDICTION OF THIS APPEAL UNDER 28 U.S.C. §1253.

The consolidated three-judge Court constituted by Chief Judge Brown was asked to enjoin the Texas reapportionment statutes for both the State Senate and the State House. That Court did not grant the plaintiffs such relief. In fact the Court held that the Senate statute was without defect and refused to interfere with the application of the House statute except in two instances. The order of the Court below from which the State appeals consisted of six parts, only the first four of which are of present concern:[19]

1. An order that unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts within the State in accordance with the constitutional guidelines set out in the District Court's opinion, the District Court will enter its own plan;

2. An order that Dallas and Bexar Counties be reapportioned into single-member representative districts in conformance with the exhibits attached to the District Court's opinion;

3. An order allowing candidates for the legislature in Bexar and Dallas Counties to run for office without regard to where they live within those counties;

4. An order directing the Secretary of State of the State of Texas to take the nec-

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[19]The other two parts of the Court's order denied relief to those plaintiffs below who were challenging the Senatorial scheme.

essary steps to implement the Court's order (A.Jur.S. 63A-64A).

The District Court thus granted declaratory relief as to the whole State, but entered an injunction affecting only two of its 254 counties. Under this Court's decision in Gunn v. University Committee to End the War, 399 U.S. 383 (1970) and Board of Regents v. New Left Educational Project, 404 U.S. 541 (1972), 28 U.S.C. §1253 does not support the State's claim that this Court has jurisdiction. And since no appeal has been filed in the United States Court of Appeals for the Fifth Circuit, this Court has no jurisdiction under 28 U.S.C. §2101(c). Gay v. Ruff, 292 U.S. 25, 30 (1934).

In Gunn, this Court held that it was without jurisdiction to review an order of a three-judge District Court that entered an order declaring a Texas statute unconstitutional but withholding injunctive relief until after the next session of the legislature met. Since the plaintiffs in Gunn had prayed for injunctive relief it is beyond question that the three-judge Court was properly constituted under 28 U.S.C. §2281. Thus in Gunn the Court established the proposition that even though the pleadings properly support the jurisdiction of the three-judge Court, this Court's jurisdiction is determined by the order of the three-judge Court and not by the pleadings in the three-judge Court.

An order such as the Court below entered regarding statewide reapportionment will not support the jurisdiction of the Supreme Court. Ruckelshaus v. Chavis, 403 U.S. 914 (1971) and Whitcomb v. Chavis, 403 U.S. 124, 138, n. 19 (1971). In those cases the Court

dealt with an order of the United States District Court for the Southern District of Indiana that declared a state legislative apportionment scheme invalid, but which stayed injunctive relief until October 1, 1969, a date after the next session of the Indiana State Legislature met. See Chavis v. Whitcomb, 305 F.Supp. 1364 (S.D. Ind. 1969). This Court held, in reliance on Gunn, that there would be no appeal to this Court from such an order since it was not an injunction. And the principle announced in Gunn has been followed consistently by this Court in other cases as well. See, e.g., Dial v. Fontaine, 399 U.S. 521 (1970), Hutcherson v. Lehtin, 399 U.S. 522 (1970); McCann v. Babbitz, 400 U.S. 1 (1970; Smith v. Garza, 401 U.S. 1006 (1971); and Unborn Child v. Doe, 402 U.S. 936 (1971). See also Perez v. Ledesma, 401 U.S. 82 (1971). Similarly, part 1 of the District Court's order here is not an injunction and hence will not support the jurisdiction of this Court.

Nor can this Court's jurisdiction be supported by any of the other parts of the District Court's order since what we have called parts 2, 3, and 4 relate only to 2 counties in the State, Dallas and Bexar. In Moody v. Flowers, 387 U.S. 97 (1967), the Court held that this Court had no jurisdiction to review an order of a three-judge District Court dismissing a complaint in which the plaintiffs sought to enjoin the enforcement of an Alabama statute prescribing the apportionment and districting scheme for electing members of a local governing authority, the Houston County Board of Revenue and Control, on the ground that the statute did not have statewide application. The holding in Moody

was expanded in Board of Regents v. New Left Education, supra, where the Court held that a Rule of the Board of Regents of the University of Texas System, which applied to three major campuses at Austin, Arlington, and El Paso and to several smaller campuses, did not have statewide impact. In New Left, the Court overruled Alabama State Teachers Assn. v. Alabama Public School and College Authority, 393 U.S. 400 (1969) (see Harlan, J. dissenting) and again emphasized that the three-judge-court statutes are to be strictly construed. In the opinion for the Court in New Left, Mr. Justice White said that the rule requiring statewide impact achieves "the congressional purpose of saving statewide regulatory legislation from invalidation through ordinary federal court equity suits, minimize[s] the burden which the three-judge court places upon the federal judiciary and avoid[s] unduly expanding the Court's carefully limited appellate jurisdiction."

That this Court has no jurisdiction when the order of the District Court has only local impact was reaffirmed in Skolnick v. Board of Commissioners, 389 U.S. 26 (1967). In that case an appeal was taken from an order by a three-judge court denying an injunction of that portion of a statewide judicial apportionment that affected Cook County, Illinois. See Skolnick v. Kerner, 260 F.Supp. 318 (N.D. Ill. 1966). The claim in the lower court was that the scheme debased the votes of racial and religious minorities in Cook County. The three-judge court denied relief; on appeal this Court vacated and remanded the order of the lower court, citing Moody v. Flowers.

This Court thus has announced three principles that control its jurisdiction

under 28 U.S.C. §1253: (1) the jurisdiction of the Supreme Court is determined by the decree of the three-judge court; (2) the only order appealable directly to the Supreme Court is one granting or denying an injunction; and (3) the injunction entered by the three-judge court must have statewide impact. Here the only injunction of the District Court has an impact solely in Dallas and Bexar Counties. There is no contention that the ordering of reapportionment in those two counties in any way affects the State's reapportionment scheme in any other part of the state--not even in those counties that adjoin Dallas and Bexar Counties. Moreover, the order of the Court below affects only 29 out of 150 seats in the Texas House of Representatives. And although Dallas and Bexar Counties are two of the most populous counties in the State, they are no more central to the State's legislative scheme than the University of Texas System was to the State's entire higher education program in New Left. And while it might be argued that part 4 of the District Court's order, which directed the Secretary of State to take the necessary steps to implement the Court's order, provides a basis for this Court's jurisdiction, the only steps required also relate solely to Dallas and Bexar Counties. Since under the most recent opinions from this Court, jurisdiction of this Court is determined by the decree of the three-judge court and since here there is no injunction that has statewide impact, we submit that the appeal here is not within this Court's jurisdiction and therefore should be dismissed.

Finally, it is significant that the only operative portion of the decision of the Court below affects just two counties,

Dallas and Bexar, both of which were subjected to glaring constitutional impositions under the Board plan. The Texas Legislature is presently in session. By the time the opinion of this Court is handed down, in all probability either it or the district court will have handed down a plenary reapportionment plan for the State. As to Dallas and Bexar Counties, the action of the district court was beyond peradventure correct, and at all events has been effectuated since primary and general elections have already been completed under the Court's order.

CONCLUSION

For the foregoing reasons, the State's appeal should be dismissed for want of jurisdiction or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

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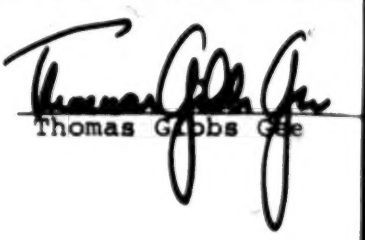
PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing Brief of Appellees has this the 9th day of February, 1973, been served upon each counsel of record for appellants in accordance with Rule 33 of this Court, by depositing the same in a United States mail box with first class postage prepaid, addressed to said counsel at their post office address



Thomas Gibbs Gee